IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 8, 2006 Session

STATE OF TENNESSEE ex rel. SYLVANA La SELVA v. HENRY PETER ZIOMEK

Appeal from the Circuit Court for Sevier County
No. 01-CS80 Ben W. Hooper, II, Judge

No. E2005-00542-COA-R3-CV - FILED FEBRUARY 23, 2006

This appeal concerns a decision of the Sevier County Circuit Court that a child support judgment entered by the Ontario Superior Court of Justice was entitled to registration, but was not entitled to enforcement in Tennessee pursuant to the Uniform Interstate Family Support Act, Tenn. Code Ann. § 36-5-2001, *et seq*. After determining that the Canadian judgment was not enforceable, the Circuit Court ordered the father to pay significantly less than the amount previously ordered by the Canadian Court. We hold that the judgment of the Ontario Superior Court of Justice is entitled to registration and enforcement in Tennessee under the Uniform Interstate Family Support Act. We also hold that the Circuit Court lacked subject matter jurisdiction to modify the father's child support payment. The judgment of the Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Paul G. Summers, Attorney General and Reporter, and Warren A. Jasper, Assistant Attorney General, Nashville, Tennessee, for the Appellant State of Tennessee *ex rel.* Sylvana La Selva.

Bruce Hill, Sevierville, Tennessee, for the Appellee Henry Peter Ziomek.

OPINION

Background

This primary issues on appeal involve whether a child support order issued by the Ontario Superior Court of Justice is entitled to registration and enforcement in Tennessee pursuant to the Uniform Interstate Family Support Act, Tenn. Code Ann. § 36-5-2001 *et seq*. In August of 1988, Sylvana La Selva ("Mother") and Henry Peter Ziomek ("Father") were married in Toronto, Canada. The parties have two daughters who currently are 12 and 14 years old. The parties were granted a divorce by the Ontario Superior Court of Justice effective August 15, 1995. The divorce decree granted Mother sole custody, care and control of the children. Father's visitation rights were set forth in the decree, as was Father's child support obligation which initially began at $750 Canadian dollars per month and gradually increased to $1,300 dollars by September of 1996.[1]

The initial child support order was modified by agreement of the parties in April of 1998. In the new order, Father was to pay $700 dollars per month in child support plus an additional $500 per month for his daughters to attend a private school. Approximately one year later, Mother sought to have the April 1998 order set aside. The following is taken from a March 2001 judgment entered by Judge Himel of the Ontario Superior Court of Justice which set aside the April 1998 child support order and established the amount of Father's current child support payment:

> In 1997, the former husband brought an application to reduce child support. The parties settled and the terms were incorporated into a judgment … dated April 8, 1998. The judgment provided for support of $700 for the two children and a payment of $500 each month for expenses for the girls to attend a private school. The former wife now submits that she entered into that settlement because of information she was told which she now believes is untrue. The 1997 income tax information was produced after the settlement conference and forms the basis of her position.…
>
> [3] Ms. La Selva says that Mr. Ziomek is self-employed as a consultant and contractor who services and sells heavy feeder machinery for industry. During the 1997 proceeding, he maintained that his annual income from his company, Process Dynamic Specialists, was $50,000 and that his business and personal expenses were high in 1997. However, the former wife has since learned that he also had gross earnings from a company he controls and his girlfriend (now his wife) was involved in an income-splitting scheme.

[1] All references to dollars from the Canadian courts refer to Canadian dollars. Likewise, references to dollars made by the Sevier County Child Support Referee or the Sevier County Circuit Court refer to U.S. dollars, unless otherwise indicated.

> The former wife alleges that the former husband failed to disclose assets and benefits from a related corporation, Process Solutions, Inc. The former husband has now re-married and resides in Tennessee with his new wife who has an interest in the related company.…
>
> [4] The former wife brought an application in May 1999 to set aside the Minutes of Settlement and consent judgment. There have been numerous court appearances since then.… On the last return date, [the former husband] appeared without counsel. Pursuant to an order by me, he paid $17,500 to the former wife immediately, and was required to file financial information by February 1, 2001. He agreed to return on February 26, 2001 for a hearing before me. The former husband did not appear for the hearing and did not move to defend the application. However, he retained counsel to appear only to request that the court not proceed with the hearing. No reason was given for his non-attendance. The husband has made some but not the complete disclosure that was ordered on January 15, 2001. The request for an adjournment was denied. Mr. Ziomeck's pleadings had been ordered struck in previous proceedings and he had no standing on this matter.
>
> [5] The former wife sought to proceed at this hearing on an uncontested basis which was granted. She submitted that the earlier judgment and Minutes of Settlement be set aside and that the court should impute income to the former husband and order child support based upon that income of $250,000.…

The Ontario Superior Court of Justice also examined some of Father's claimed expenses for his company. For example, the Court noted that Father's company had gross income of $208,866.84 and expenses totaling $108,814 in 1997. However, $52,967.30 of the claimed expenses involved subcontracts with Father's new wife, Father's sister, and the "related" company. Father subcontracted with his new wife to perform accounting services for $20,000 even though his new wife was neither an accountant nor a bookkeeper. Father contracted with his sister for $5,000 for the sister simply to open the company's mail in Toronto. There also were invoices to the related company which lacked "any detail, unlike the type of invoices provided to other companies for services rendered." Based on the foregoing and given that there was no countervailing proof offered by Father because he chose not to attend the hearing, the Ontario Superior Court of Justice entered a judgment against Father and ordered him to pay child support based on an imputed annual income of $250,000.

After Father's new child support obligation was established following his non-attendance at the February 2001 hearing, Father filed a motion with the Ontario Superior Court of Justice seeking to have his child support obligation reduced. Father claimed the monthly amount

of child support that he was ordered to pay exceeded his monthly net income. Father's motion to reduce his child support was denied, and Father appealed that denial to the Court of Appeal for Ontario. The Court of Appeal for Ontario entered an order requiring Father to post security for costs in the amount of $68,000 before it would consider the merits of Father's appeal. The $68,000 was comprised of $48,000 in costs previously assessed against Father, and an additional $20,000 to cover costs of the appeal.[2] Because Father allegedly was unable to post security for that amount, his appeal was dismissed.

After the Ontario Superior Court of Justice denied Father's motion to have his child support reduced, but before the dismissal of his appeal by the Ontario Court of Appeal, the State of Tennessee (the "State") filed the present lawsuit on Mother's behalf seeking to enforce the judgment of the Ontario Superior Court of Justice. The Sevier County Child Support Referee registered the Canadian judgment pursuant to the Uniform Interstate Family Support Act ("UIFSA"), Tenn. Code Ann. § 36-5-2001 *et seq*. In June of 2002, the Referee entered Findings and Recommendations to the effect that Father was in arrears a total of $200,511.27 Canadian dollars. The Referee recommended that Father be ordered to pay $1,867.33 in U.S. dollars each month for current support as ordered by the Canadian Court, and an additional $1,333.33 each month in U.S. dollars toward the arrearages. On July 3, 2002, the Sevier County Circuit Court entered an order adopting the Findings and Recommendations of the Referee.

Shortly after the Circuit Court adopted the Referee's findings, Father filed a motion to stay the proceedings and for relief pursuant to Tenn. R. Civ. P. 59 and 60. Father again claimed that he was unable to pay the amount of child support as ordered because that amount exceeded his monthly net income. Prior to any ruling on Father's motion, the State filed a petition to have Father held in civil contempt of court based on Father's failure to comply with the Circuit Court's order which adopted the Referee's Findings and Recommendations. The motions were consolidated and following a hearing, the Referee entered Findings and Recommendations that Father's motion for a stay and/or for relief pursuant to Tenn. R. Civ. P. 59 and 60 should be denied. The Referee also concluded Father was "in willful and deliberate contempt of court for failure to pay child support as ordered." The Referee sentenced Father to six months in jail for civil contempt of court, but reserved imposition of the sentence until January 2, 2003, giving Father until that time to purge himself of the contempt by paying $68,000 toward the child support arrearages.

Father obviously was not pleased with the Referee's findings and requested a rehearing before the Sevier County Circuit Court which conducted two hearings. The first hearing was in February of 2003. The only witness was Father and his testimony was confined to whether he was denied due process by the Canadian courts when he was required to post security in the amount of $68,000 before the Ontario Court of Appeal would consider the merits of his appeal. We

[2] The record is unclear on what constitutes "costs" under Canadian law. It is apparent that the "costs" include more than what would be considered court costs and discretionary costs under Tennessee law. According to Judge Himel, Mother was put to "extraordinary expense" to obtain child support from Father. Mother was awarded costs on a "party and party scale and include costs awarded for the attendance on January 15, 2001."

note that Father's explanation for missing the February 26, 2001, hearing before Judge Himel was that he "was given an opportunity for a five-day project which would give me an income of about $5,000." Father clearly had notice of the hearing and simply chose the work project over attending court. As such, the Sevier County Circuit Court concluded that Father was the author of his own misfortune and that he had not been denied due process. The Canadian judgment was, therefore, entitled to registration under the UIFSA. The Circuit Court also pointed out that Tennessee law and the relevant Canadian law were consistent in that Tenn. Code Ann. § 36-5-101(g)(3) permits a court to refuse to hear a request to modify when arrearages exist which are the result of the moving party's intentional acts. Although the Circuit Court held that the Canadian judgment was entitled to registration, the Circuit Court specifically reserved ruling on whether that judgment was enforceable.

The next hearing was over one year later, in March of 2004, and centered around the enforceability of the Canadian judgment. By this time, the State had filed a second petition for contempt, claiming Father now was in arrears a total of $231,167.87. At the second hearing, Father testified that he then was employed by a company in Morristown and earned $2,800 in net pay per month. Although not entirely clear, it appears that after the previous hearing over one year earlier, Father paid child support of $500 in March of 2003, $2,500 in October of 2003, and between $450 and $600 each month thereafter. Father did not work during June, July, or August of 2003 because the children were with him and he wanted to spend time with them. Because he had no income, he paid no child support. Father also stated he did not pay any child support during some of the other months because he had to pay his own bills.

Following the second hearing, the Circuit Court entered an order denying enforcement of the Canadian judgment. According to the Circuit Court:

> [T]he Court finds that no fault can be found with the Canadian order and that Respondent's actions in failing to appear at trial resulted in its entry. However, circumstances have changed such that Respondent should be afforded the opportunity to petition the Canadian court, appear there and present all proof, evidence and testimony with regard to his income. Justice requires a search for the truth, and although Respondent may have previously interfered with that search, if it can now be conducted so that a more accurate figure can be reached, it must be done. Our law in Tennessee is that the Court absolutely cannot assess a child support obligation that cannot be paid, and one cannot be held in contempt of court for failing to do something one cannot do. This Court cannot enforce the order now in existence because it flies in the face of our law.

The Circuit Court then refused to enforce the Canadian judgment, ordered Father to pay "at least $500 or $600 per month in current child support," and dismissed the State's petition for contempt.[3]

The State appeals claiming that the Circuit Court erred when it refused to enforce the Canadian judgment as written and that it further erred when it effectively modified Father's child support payment by requiring him to pay only $500 to $600 per month. Father claims that the Circuit Court erred when it registered the Canadian judgment, but that it properly refused its enforcement.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

To address problems that can arise when a parent and the child(ren) live in one state, and the obligor parent in a different state, most if not all states have enacted a Uniform Interstate Family Support Act ("UIFSA"). Tennessee's UIFSA is codified at Tenn. Code Ann. § 36-5-2001 *et seq*. In very general terms, the UIFSA sets forth a mechanism by which support orders from other states can be registered and enforced in Tennessee when the obligor parent lives in Tennessee. Likewise, Tennessee support orders are accorded the same deference when the child and obligee parent are Tennessee residents, but the obligor parent lives in another state. The reciprocity between states set forth in the UIFSA applies to foreign countries in certain circumstances because the statute defines a "state" to include a "foreign jurisdiction that has enacted a law or establishes procedures for issuance and enforcement of support orders which are substantially similar" to Tennessee's Act. Tenn. Code Ann. § 36-5-2101(19)(B). The parties agree that Ontario, Canada, is such a reciprocating foreign jurisdiction. *See* 67 Fed. Reg. No. 231 at p. 71605, 71606 (Dec. 2, 2002).

Father correctly argues that he must comply with Tenn. Code Ann. § 36-5-2607 in order to effectively challenge the registration and/or the enforceability of the Canadian judgment. This statute provides as follows:

> **Contest of registration or enforcement. –** (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

[3] The Circuit Court stated at the March 2004 hearing that Mother likely would appeal and in fact "[s]he probably should because I'm not following the law."

> (1) The issuing tribunal lacked personal jurisdiction over the contesting party;
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> (2) The order was obtained by fraud;
>
> (3) The order has been vacated, suspended, or modified by a later order;
>
> (4) The issuing tribunal has stayed the order pending appeal;
>
> (5) There is a defense under the law of this state to the remedy sought;
>
> (6) Full or partial payment has been made; or
>
> (7) The statute of limitation under § 36-5-2604 (Choice of Law) precludes enforcement of some or all of the arrearages.
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> (b) If a party presents evidence establishing a full or partial defense under subsection (a), a tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.
>
> (c) If the contesting party does not establish a defense under subsection (a) to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

Tenn. Code Ann. § 36-5-2607.

Father argues that he was denied due process when the Ontario Court of Appeal refused to hear the merits of his appeal until he posted security for $68,000 in costs. Father then argues that this denial of due process would be a defense under the Tennessee Constitution, thereby coming within the purview of Tenn. Code Ann. § 36-5-2607(a)(5).

Although costs under Canadian law may be much more significant than under Tennessee law, simply because Father was required to post security for costs before his appeal could proceed does not *per se* result in a due process violation. As with Canadian law, Tennessee law requires an appellant to post security for costs. Specifically, Tenn. R. App. P. 6 requires an appellant

to post security for costs on appeal and the failure to do so can result in dismissal of the appeal.[4] As the constitutionality of Tenn. R. App. P. 6 is not directly at issue in this appeal, we are altogether disinclined to implicitly hold that Tenn. R. App. P. 6 is unconstitutional by directly holding that the Canadian procedure runs afoul of Father's due process rights by requiring him to post security for costs before he can proceed with an appeal.

The inescapable conclusion is that Father is responsible for his own misfortune. Father deliberately chose not to attend the February 2001 hearing, opting instead to pursue a potentially lucrative business venture. Because of his deliberate choice, Father was not present to defend against any potential judgment that could have been rendered by the Ontario Superior Court of Justice. He cannot now be heard to complain to a Tennessee court about the result of that hearing.

It is worth mentioning that if we were to accept Father's argument that he was denied due process, then an obligor parent living in Tennessee could avoid enforcement of a Canadian child support judgment simply by intentionally failing to attend a relevant hearing and then claiming an inability to post security for costs prior to being allowed to appeal. This would have the effect of rendering those Canadian child support judgments unenforceable in Tennessee despite the fact that the United States Department of State has specifically deemed the Canadian provinces of Alberta, British Columbia, Manitoba, Newfoundland/Labrador, Nova Scotia, and Ontario as reciprocating foreign jurisdictions for purposes of the enforcement of family support obligations. *See* 42 U.S.C. § 659a; 67 Fed. Reg. No. 231 at p. 71605, 71606 (Dec. 2, 2002). It requires no great imagination to anticipate Canadian courts' likely response to this lack of reciprocity if we were to adopt Father's position.

The next issue is whether the Trial Court modified the Canadian judgment when it ordered Father to pay "$500 or $600" each month in child support. Father admits in his brief that in accordance with Tenn. Code Ann. § 36-5-2611, the Sevier County Circuit Court was without subject matter jurisdiction to modify the Canadian child support judgment. We agree. *See Letellier v. Letellier*, 40 S.W.3d 490 (Tenn. 2001)(concluding that Tennessee courts did not have subject matter jurisdiction to modify a support order issued by another state when the mother, who sought modification, was a Tennessee resident thereby defeating the prerequisites to jurisdiction set forth in Tenn. Code Ann. § 36-5-2611(a)). Father addresses this argument by claiming the Circuit Court really did not modify the Canadian judgment, but rather enforced that judgment only to the extent that Father actually could pay the support, i.e., "$500 or $600" per month.

The judgment entered by the Ontario Superior Court of Justice set Father's child support obligation as follows:

> A more accurate estimate of [the former husband's] annual income was $250,000. Had the husband properly disclosed his income in

[4] Of course, there are exceptions under Tenn. R. App. P. 6, such as when an appellant is indigent. Father does not claim that he is or ever has been indigent.

> 1997, the table amount under the Guidelines on income of $250,000 was $2,801 per month. The husband paid $700. The difference is $2,101 per month. That amount must be calculated for 34 months and shall include interest. Ongoing child support shall commence on April 1, 2001 and shall be paid at the rate of $2,801 for the support of the two children …. Arrears shall be paid at the rate of $2,000 per month commencing on April 1, 2001 and shall be paid on a monthly basis thereafter until they are paid off.

We are at a loss as to how the Circuit Court's holding that Father should pay only $500 to $600 per month in child support can be deemed to be anything other than a direct modification of the Canadian judgment, which both parties and the Circuit Court agree the Circuit Court lacked subject matter jurisdiction to do. As the Circuit Court lacked jurisdiction to modify the judgment, on remand the Circuit Court is directed to enforce the judgment as rendered by the Ontario Superior Court of Justice.

Although the Circuit Court's dismissal of the State's petition for civil contempt is not directly challenged on appeal or addressed in the parties' briefs, it is necessary we discuss some of the applicable law pertaining to civil contempt proceedings. The obvious reason the Circuit Court modified Father's child support obligation is that Father convinced the Circuit Court that $500 to $600 was all that he could afford to pay. We agree with the Circuit Court insofar as it stated that under Tennessee law, an obligor parent generally cannot be required to pay child support in excess of that parent's net income. Canadian law is no different. The difference in opinion between the Ontario Superior Court of Justice and the Circuit Court lies in what each court believed to be Father's actual income. The Ontario Superior Court of Justice concluded that based on Father's shenanigans with reporting the true income and expenses from his company and the "related" company, etc., that Father effectively hid income from Mother in order to lower his child support payment. In short, the Ontario Superior Court of Justice found Father to have been less than truthful. Accordingly, that Court held that Father's imputed income was $250,000 and based his child support payment on that imputed amount.

The analysis under Tennessee law would be quite similar. The Tennessee Child Support Guidelines include as gross income numerous items including wages, salaries, commissions, and income from self-employment, etc. *See* Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(a)(1). An obligor parent's actual income certainly can be adjusted upward to account for income the parent deceptively failed to report. The Tennessee Guidelines likewise allow a court to impute income to a parent under certain circumstances, such as when a parent is voluntarily unemployed or underemployed. *See* Tenn. Comp. R & Regs. §§ 1240-2-4-.04(3)(a)(2) and .04(3)(d). Thus, if a parent is voluntarily unemployed or significantly underemployed, it is possible that parent could be ordered to pay child support in excess of his or her net income. The point being, the judgment of the Canadian court was not a judgment requiring a parent who had been honest and forthright to pay child support in excess of his true net income. Father is not an innocent victim here.

When the Ontario Superior Court of Justice concluded that Father's income should be $250,000 for purposes of determining his child support obligation, it was doing so based on the proof presented to it at that time. Further impacting that Court's decision was Father's absence and the attendant lack of any countervailing proof. It was over three years later when the Circuit Court in Tennessee conducted the hearing where it determined that Father was not in civil contempt of court. At this hearing three years later, Father testified that he had "completely wound down" his business and was employed full-time in Morristown with net monthly income of approximately $2,800.

In *Overnite Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005), our Supreme Court stated that:

> A civil contempt action is generally brought to enforce private rights. *See Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 377 S.W.2d 908, 912 (1964).… One may violate a court's order by either refusing to perform an act mandated by the order or performing an act forbidden by the order. If the contemnor has refused to perform an act mandated by the court's order and the contemnor has the ability to comply with the order at the time of the contempt hearing, the court may fine or imprison the contemnor until the act is performed. Tenn. Code Ann. § 29-9-104 (1980 & 2000); *see Ahern*, 15 S.W.3d at 79. Thus, the contemnor possesses the "keys to the jail" and can purge the contempt through compliance with the court's order. *Id.*

Overnite Transportation, 172 S.W.3d at 510, 511.

Overnite Transportation makes clear that one aspect of civil contempt is the contemnor's ability to comply with the order and thereby purge himself of the contempt. Therefore, *if* Father honestly is making $2,800 a month in net income, and assuming he is not voluntarily underemployed, hiding assets or income, understating his income etc., then he would be unable to comply fully with the terms of the Canadian judgment. Lacking the ability to purge himself of the contempt under these facts, he should not be found in civil contempt. As the Circuit Court correctly stated, Father cannot be held in contempt for his failure to do something he cannot do. However, it is not necessarily an all or nothing situation as there is nothing excusing Father from having to pay the absolute maximum that he has the ability to pay in order to avoid a finding of civil contempt, even if that amount is less than the full amount ordered by the Canadian court. On remand, the Circuit Court is instructed to determine the maximum amount Father reasonably has the ability to pay in child support with the upper limit being the amount ordered by the Canadian court, and to ensure that Father pays that amount. A willful failure by Father to comply with paying the most that he now has the ability to pay could result in a finding of civil contempt. If the maximum amount that Father can and does pay is less than the amount ordered by the Canadian court, then any deficiency will continue to accrue as an arrearage and be enforceable as any other judgment for child support

arrearages in this State.[5] If Father can establish that his child support payment should be lowered, that decision will have to be made by an appropriate court with subject matter jurisdiction to do so. Right now, that is the Ontario Superior Court of Justice.

In summary, we conclude that Father has failed to prove the existence of any defense to the registration or the enforcement of the child support order issue by the Ontario Superior Court of Justice. We affirm the Trial Court's judgment insofar as it registered the judgment of the Ontario Superior Court of Justice. We reverse the Trial Court's judgment which concluded that the Canadian judgment was not entitled to enforcement and that Father should be ordered to pay only $500 to $600 per month. On remand, the Circuit Court is instructed to enforce the judgment of the Ontario Superior Court of Justice, determine the amount of Father's arrearages since the entry of the Canadian judgment, and to require Father to pay child support in an amount consistent with this Opinion.

Conclusion

The judgment of the Sevier County Circuit Court is affirmed in part and reversed in part. This case is remanded to the Circuit Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee Henry Peter Ziomek.

D. MICHAEL SWINEY, JUDGE

[5] Utilizing the Tennessee Child Support Guidelines in existence at the time of the hearing, based on Father's net income of $2,800, his child support payment would have been 32% of the net income, or $896 U.S. Dollars per month. This amount would not take into account any payment toward the substantial amount of arrearages. Even though the Tennessee Guidelines technically do not apply in this case, it is troubling that the Circuit Court ordered Father to pay an amount that was several hundred dollars a month less than he would have been required to pay under Tennessee law if the Guidelines applied. On remand, when determining the maximum amount Father reasonably has the ability to pay in child support, in no event will that amount be less than what Father would have to pay under the Tennessee Guidelines, but it certainly can be more, with the cap being the amount set by the Canadian court. Reciprocity demands this result.